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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 18, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

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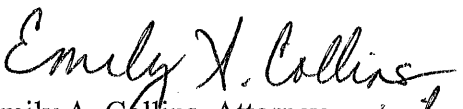
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

RE: **DOUBLE DIAMOND, INC.**
TCEQ DOCKET NO. 2007-1374-UCR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Brief on Motion to Overturn in the above-entitled matter.

Sincerely,


Emily A. Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

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TCEQ DOCKET NO. 2007-1374-UCR

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IN THE MATTER OF THE PETITION	§	BEFORE THE TEXAS
BY DOUBLE DIAMOND, INC., FOR	§	
EXPEDITED RELEASE FROM CCN	§	COMMISSION ON
NO. 12362 IN GRAYSON COUNTY;	§	
APPLICATION NO. 35564-C	§	ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
BRIEF ON MOTION TO OVERTURN**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Brief on Motion to Overturn the Executive Director's ("ED's") denial of the petition in the above-referenced matter, and would respectfully recommend denying the Motion.

I. INTRODUCTION

As a result of House Bill 2876 from Texas' 79th Regular Legislative Session, Double Diamond, Inc. ("DDI"), a landowner of approximately 1,250 acres in the Northwest Grayson County Water Control and Improvement District No. 1's Water CCN No. 12362 ("Grayson County WCID" or "the WCID"), petitioned TCEQ for an expedited release of its acreage from CCN No. 12362 so that DDI may receive service from another retail public utility. Pursuant to 30 Texas Administrative Code ("TAC") section 291.113(d), the ED, in an Order issued July 23, 2007, denied DDI's petition on the basis of the following findings: (1) failure of DDI to show that Grayson County WCID refused to provide service;¹ (2) failure of DDI to show that Grayson County WCID is not capable of providing adequate and continuous service within the timeframe,

¹ This finding was made on the basis of requirements in Texas Water Code ("TWC") section 13.254(a-1)(3)(A) and 30 TAC section 291.113(b)(3)(A).

at the level, or in the manner reasonably needed or requested;² (3) failure of DDI to show that the WCID conditioned provision of service on payment of costs not properly allocable directly to DDI's service request;³ and (4) failure of DDI to show that the alternate retail public utility is capable of providing adequate and continuous service within the timeframe, at the level, and in the manner reasonably needed or requested.⁴

In response to the Order denying their petition, DDI filed a Motion to Overturn the Executive Director's decision asserting that the ED misinterpreted or misapplied the "standards and principles" set forth in TWC section 13.254(a-1). DDI cites its particular objections to the ED's findings on improper allocation of costs,⁵ the capability of the alternate retail public utility to provide continuous and adequate service,⁶ and the capability of the Grayson County WCID to provide service at the level and manner requested by DDI.⁷ DDI also states that the ED's findings are inadequate due to lingering uncertainty as to the weight the ED attributed to conflicting statements and evidence provided in the petition, the response by Grayson County WCID, and subsequent communications provided to the ED.

Grayson County WCID filed a Reply to DDI's Motion to Overturn stating that the ED's "decision and conclusion were correct, accurate, and properly supported by the facts presented and the Texas Water Code."

² TWC § 13.254(a-1)(3)(B); 30 TAC § 291.113(b)(3)(B).

³ TWC § 13.254(a-1)(3)(C); 30 TAC § 291.113(b)(3)(C).

⁴ TWC § 13.254(a-1)(4); 30 TAC § 291.113(b)(4).

⁵ TWC § 13.254(a-1)(3)(C); 30 TAC § 291.113(b)(3)(C).

⁶ TWC § 13.254(a-1)(4); 30 TAC § 291.113(b)(4).

⁷ TWC § 13.254(a-1)(3)(B); 30 TAC § 291.113(b)(3)(B).

II. STATEMENT OF FACTS

On May 24, 2006, Mr. Randy Gracy, Vice President of DDI, sent a letter to the WCID requesting "an adequate source and quantity of potable water, sufficient storage and pressure capacity as the demand warrants per TCEQ guidelines" to serve the following schedule:

- Phase I: 681 residential properties by January 2007;
- Phase II: 418 residential properties, a sales office and a corporate meeting facility by July 2007;
- Phase III: 473 residential properties, 30 condominiums, ships store, a swimming pool, a marina, and a bathhouse by January 2008;
- Phase IV: 346 residential properties, an 100-room hotel, 50 condominiums, and a restaurant by July 2008; and
- Phase V: 222 residential properties, an 100-room hotel expansion, and 50 condominiums by January 2009.

The WCID's Engineer, Kerry D. Maroney, P.E., responded on July 20, 2006, stating that "the District will provide an adequate source and quantity of potable water, sufficient storage, and pressure capacity as the demand warrants and in compliance with TCEQ regulations." Mr. Maroney also stated that the District is "eager to provide service" upon the execution of a non-standard service agreement. The letter was accompanied by a "preliminary cost estimate" with the qualification that the "District is in need of additional information from DDI in order to provide a complete estimate." The estimate included improvements including distribution lines, valves, three water supply wells and lines, improvements to pump station number 2 and a new pump station number 3, and a 500,000 gallon elevated tank to accommodate DDI's needs in Phase I and Phase II. The estimated total costs of the needed infrastructure and fees for the first

two phases came to \$5,082,700. The WCID's needed improvements for Phase 3 through 5 included distribution lines, valves, boring and casings, a pump station, a 1 MGD water treatment plant, and an intake structure. The total cost of the estimated infrastructure and associated fees came to \$8,932,500.

On December 12, 2006, Mr. Randy Gracy, President of Double Diamond Utilities ("DDU") responded to DDI's apparent request for service by stating that DDU has the "financial, technical, and managerial capability to serve" DDI's development, and DDU has initiated a water availability study for the area and "has determined that it can provide adequate and continuous service" to DDI.

On December 14, 2006, DDI filed a petition with TCEQ for expedited release from the WCID's water CCN number 12362 stating that the WCID cannot provide the level of water service required by DDI because the WCID is a "small rural water system, with only modest facilities, about 650 connections and limited resources." DDI further states that the WCID has conditioned the provision of service to DDI's development on the payment of costs not properly allocable to the Petitioner, and DDU has committed to providing continuous and adequate service within the timeframe, at the level, and in the manner requested. DDI also requests that the Commission simultaneously grant the petition and transfer the portion of the CCN for DDI's development property to DDU and order it to provide service to DDI.

The WCID responded on December 26, 2006, requesting return of the petition for lack of standing, the lack of an application from DDI seeking service from the WCID, and DDI's failure to provide information in the petition showing that DDU can provide adequate and continuous service within the proposed timeframe. Mr. Arturo D. Rodriguez, Jr., for the WCID, also states that it has an adequate water supply to serve 654 active customers with excess well capacity to

serve an additional 479 customers. Mr. Rodriguez states that the installation of larger pumps in each well can increase the production of the existing wells and provide an excess water supply to serve another 762 customers above the existing customers. The WCID also responded that it was negotiating with the Greater Texoma Utility Authority to purchase 2,000 acre-feet per year of surface water that should become available to the WCID during the summer of 2008. In addition, Mr. Rodriguez points out that the WCID was not provided sufficient information in DDI's "service request" of May 24, 2006, to determine the level of water service required by DDI. The WCID also disputes the capability of DDU to provide adequate and continuous service to the proposed development as well as DDI's contention that the WCID conditioned the provision of service on costs not properly allocable to DDI's requested service demands and timeframe. Finally, the WCID clarifies that the preliminary estimate provided in its July 20, 2006, letter to DDI "did not include any additional capacity for utilization by the District or any future customers of the District," but only included proposed facilities sized to serve the DDI development.

The ED "accepted the petition for filing" on February 7, 2007, and then requested more information from DDI on February 9, 2007. The ED then abated consideration of the Petition on March 13, 2007, at the request of DDI and the WCID. DDI requested that the ED resume consideration of the Petition on May 25, 2007. The ED states in his Order that he began processing the Petition on May 26, 2007.

The ED issued a Notice of Deficiency to DDI on June 15, 2007, requesting more information regarding the difference between the timeline, level and manner of service requested from the WCID in May of 2006 and the timeline, level and manner of service requested by DDI in a separate application for approval of the plan and specifications of its water system operated

by DDU. DDI responded on June 25, 2007, with the following revised timeline and level of service information:

- Phase I: 477 needed currently;
- Phase I.A: 100 residential lots by September 2007;
- Phase II: 580 residential lots by July 2008;
- Phase III: 518 residential lots, a sales office, and a corporate meeting facility by July 2009;
- Phase IV: 473 residential lots, 30 condominiums, shops store, swimming pool, marina and bathhouse by July 2010;
- Phase V: 346 residential lots, 100 room hotel, 50 condominiums and a restaurant by July 2011; and
- Phase VI: 222 residential lots, 100 room hotel expansion, and 50 condominiums by July 2012.

These revisions were then answered by the ED's Order denying the petition on July 23, 2007.

III. DISCUSSION OF THE ISSUES PRESENTED

A. Has the Petitioner Demonstrated that Grayson County WCID is Incapable of Providing Service when DDI has Revised its Timeline and its Needed Number of Connections?

One option available to a person seeking expedited release from a CCN to receive service from another retail public utility involves a demonstration that the current certificate holder "is not capable of providing the service on a continuous and adequate basis within the timeframe, at the level, or in the manner reasonably needed or requested by current and projected service demands in the area."⁸ The ED cites the following reasons for its finding that DDI failed to make the requisite showing under this factor for the certificate holder: (1) DDI did not provide an accurate timeline to the WCID for consideration; (2) the WCID has current excess capacity to serve DDI's needs and distribution lines within 1,800 feet of the proposed development; and (3) DDI did not show that the cost estimates would not meet the level and manner of service needed

⁸ TWC § 13.254(a-1)(3)(B); 30 TAC § 291.113(b)(3)(B).

because those estimates were made for the original service request rather than the revised service request.

DDI argues in a footnote that the WCID (1) does not have enough capacity to serve its customers and has very limited resources, (2) does not have a contract for surface water supply, and (3) cannot rely on mere statements by their engineer that the WCID is capable of providing continuous and adequate service to the proposed development.

DDI's original request was for the following:

- Phase I and II: 1,099 connections by July 2007; and
- Phase III, IV, V: 1,041 residential units, 130 condominiums, 200 hotel rooms, and several commercial facilities by January 2009.

DDI then revised its service request in response to a Notice of Deficiency⁹ to the following:

- Phase I: 477 needed currently;
- Phase I.A: 100 residential lots by September 2007;
- Phase II: 580 residential lots by July 2008;
- Phase III: 518 residential lots, a sales office, and a corporate meeting facility by July 2009;
- Phase IV: 473 residential lots, 30 condominiums, ships store, swimming pool, marina and bathhouse by July 2010;
- Phase V: 346 residential lots, 100 room hotel, 50 condominiums and a restaurant by July 2011; and
- Phase VI: 222 residential lots, 100 room hotel expansion, and 50 condominiums by July 2012.

By statute and rule, the petitioner must demonstrate that it allowed the current certificate holder 90 days to review and respond to a request for service that identifies the timeframe in which service is needed as well as the level and manner of service needed for current and

⁹ Notably, this revision was in response to a NOD rather than a revised service request to the WCID.

projected service demands in the area.¹⁰ Here, the WCID was not given that opportunity. Under 30 TAC section 291.113(b)(1) and (2), the WCID should have been given 90 days to respond to the June 25, 2007, revised timeframe. That could only have happened if the ED had denied the petition and returned it under 30 TAC section 291.113(b)(1) and (2) on the grounds that the revised June 25, 2007, timeframe differed from the timeline provided to the WCID for review and response.¹¹

However, to the extent that consideration of the level and manner of service are not contingent on the timeframe, the ED appropriately found that the WCID has current excess capacity to “immediately provide phase-in water service to the development” as well as distribution lines within 1,800 feet of the proposed development as a reason for denial under 30 TAC section 291.113(b)(3)(B). The WCID agreed to provide service, albeit through construction of new wells, pump stations, storage tanks, and distribution lines, with an adequate quantity of water at the quality of service desired.¹² The level of service requested, which DDI understands to be related to water supply, and the manner of service requested, which DDI relates to the adequacy of supplies, facilities or the means of financing or paying for such improvements each appear to be met by the WCID’s estimate for infrastructure to handle DDI’s

¹⁰ TWC § 13.254(a-1)(1), (2); 30 TAC § 291.113(b)(1), (2). OPIC recognizes that the District has argued that the May 24, 2006, letter from DDI did not provide enough information to constitute a service request.

¹¹ OPIC notes that 30 TAC, Chapter 281 (Applications Processing), which includes “applications return” procedures for applications and petitions as well as “technical review” procedures, does not appear to apply to a TWC section 13.254(a-1) petition. Nevertheless, perhaps the correct procedural course of action should have been to return the petition due to the revisions and allow DDI to submit a petition again once the WCID had 90 days to review and respond to the change. The ED cannot, as he indicates in the order, evaluate a moving target.

¹² Letter from Kerry D. Maroney, P.E., on behalf of the Northwest Grayson County WCID #1 to Randy Gracy, Vice President of Double Diamond Companies, dated July 20, 2006. Notably, the WCID indicated that it needed more information to complete the estimate provided, and it is unclear that DDI adequately identified the level of service needed or requested in its “service request.” 30 TAC § 291.113(b)(1), (2).

request for service. The WCID stated again in a February 5, 2007, letter that it continues to have the ability and desire to provide phased-in capacity for DDI.¹³ While DDI claims that the WCID does not have the means of financing or paying for the improvements, the means of paying for the infrastructure needed to provide service would need to be paid for by DDI, not the WCID, to the extent that those improvements are sized for servicing only the DDI development. The WCID has shown that, upon contracting with the developer, it can provide progressively greater capacity that will meet the requested and projected needs for service on a continuous and adequate basis.¹⁴ Therefore, OPIC recommends that the Commission deny the MTO on the basis of 30 TAC section 291.113(b)(3)(B).

B. Do the ED's Findings Regarding Failure to Show Improper Allocation of Costs State an Adequate Basis for Denial under 30 TAC section 291.113(b)(3)(C) when the Grayson County WCID's Preliminary Estimate Includes Costs that May be Required under Any Proposed Timeline?

A Petitioner seeking expedited release of an area from a CCN must show that the current CCN holder has either refused to provide service, is not capable of providing the service, or “conditions the provision of service on the payment of costs not properly allocable directly to the petitioner’s service request.”¹⁵ The ED made express findings that DDI failed to show that

¹³ OPIC notes that DDI claims that it will be impossible for any petitioner to meet their burden on 30 TAC section 291.113(b)(3)(B) if mere statements of capability by the CCN holder suffice to defeat the petitioner’s case. However, a CCN holder will frequently be in the position of needing to increase their capacity and build more infrastructure to meet a developer’s needs. Where, as here, the CCN holder has actively provided estimates to serve the development and has actively sought to detail and contract for the infrastructure improvements that it is willing to make to serve the developer’s needs and requests, OPIC cannot agree that the weight of the evidence was misconstrued.

¹⁴ Furthermore, if the Commission decides that the revised timeline is of any import to 30 TAC section 291.113(b)(3)(B), the revised timeline includes an increase in the ultimate number of connections (at least residential connections). An increased number of connections would probably require similar or greater infrastructure construction, which, according to their Reply, the WCID seems to be more than willing to provide.

¹⁵ TWC § 13.254(a-1)(3)(A)-(C); 30 TAC § 291.113(b)(3)(A)-(C).

Grayson County WCID conditioned its service on the payment of costs that are not directly allocable to DDI's service request because DDI revised its timeline for needing service and the WCID was not given the opportunity to revise its cost estimate, which, according to the ED, may result in an estimate that eliminates the costs that DDI claims are not properly allocable to its service request. In addition, the ED states that the WCID provided evidence that the cost information relates solely to construction of facilities needed to serve DDI's proposed development.

A revised timeline does not necessarily mean that the costs quoted by the WCID are properly allocable to DDI. As stated above, the revised timeline shows that DDI failed to allow the WCID the requisite 90 days to review and respond to the request for service, and shows that the original request for service failed to identify "the time frame within which service is needed for current and projected service demands." However, the revised timeframe alone does not settle the question of whether the WCID's cost estimate was properly allocated.

OPIC agrees with the ED's conclusion on allocation of costs and the basis for that conclusion as stated in the WCID's Reply and the last half of the ED's findings under 30 TAC section 291.113(b)(3)(C). The WCID's preliminary cost estimate based on the originally requested timeframe included 40,000 linear feet of 12-inch PVC line in the first two phases as well as 6,000 linear feet of 12-inch PVC line and 3,000 linear feet of 18-inch PVC line in phases three through five. DDI claims that these lines will be constructed only for the benefit of the developer, and, therefore, the cost of the lines should not be properly allocated to DDI. OPIC does not agree with DDI's analysis.

A procedural mechanism to allow expedited release from a CCN to landowners of 50 acres or more who are not already receiving water or sewer service was made available by the legislature because “[s]ome CCN holders have demanded payment of exorbitant sums to release property from a CCN” and often times those payments bore “no relation to investments in utility infrastructure or capacity to serve the land, because no such investment has been made.”¹⁶ Based on the legislative intent behind HB 2876, a petitioner must show that the certificate holder’s proposed costs do not reasonably relate to the cost of constructing necessary infrastructure and capacity to serve the requested area. While the WCID may benefit from providing service to DDI, the Petitioner has not shown that the proposed costs are unrelated to investments in utility infrastructure or capacity needed to serve DDI’s proposed development. Furthermore, DDI has not provided any evidence that the WCID is laying the off-site lines for any other reason than to construct necessary infrastructure to provide adequate and continuous service to DDI’s proposed development.¹⁷ As it appears that the WCID would only construct the lines proposed in its preliminary estimate for the sole purpose of providing service to DDI’s proposed development and those costs appear to be reasonably related to the infrastructure needed to serve DDI’s development, OPIC finds that the proposed costs the WCID has allocated to DDI are a direct result of DDI’s service request, and, thus, are properly allocable to DDI. Therefore, OPIC recommends that the Commission deny the Motion to Overturn on the basis of DDI’s failure to

¹⁶ Senate Research Center Bill Analysis, C.S.H.B. 2876, 79th Legislature, Natural Resources Committee Report, Author’s/Sponsor’s Statement of Intent, dated May 20, 2005.

¹⁷ If those lines are later used for the provision of service to other WCID customers, it is not uncommon (in OPIC’s experience) for developers to enter into an agreement with the WCID that a reallocation of costs would occur as others hook into the system via the lines originally constructed for DDI.

demonstrate that the WCID conditioned the provision of service on the payment of costs not directly allocable to DDI's service request.

C. Has the Petitioner Demonstrated the Capability of Double Diamond Utilities to Provide Continuous and Adequate Service?

In addition to a demonstration that the certificate holder has either refused to provide service, is incapable of providing continuous and adequate service, or conditions service on the payments of costs not properly allocable to the service request, a petitioner also must show that an alternate retail public utility is "capable of providing continuous and adequate service within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area."¹⁸ The ED found that DDI failed to meet its burden on this point for the following reasons: (1) the nearest Double Diamond Utilities Company (DDU) is over 100 miles away, (2) the developer, rather than the proposed alternate retail public utility, provided plans for a proposed water plant that will serve only 200 connections, (3) no plans have been submitted for a distribution system, and (4) the timeline for service, level and manner of service requested from the CCN holder differ from the level and manner of service and the timeline submitted for the alternate retail public utility's water plant.

DDI claims that Double Diamond Utilities ("DDU") has financial ability and experience providing retail water service similar to DDI's proposed development to provide continuous and adequate service to DDI. In addition, DDI contends that the ED has randomly created new

¹⁸ TWC § 13.254(a-1)(4); 30 TAC § 291.113(b)(4). An "alternate retail public utility" must be either an "existing retail public utility" or "a district proposed to be created under Texas Constitution, Article 16, §59 or Article 3, § 52. 30 TAC § 291.113(b)(4)(A), (B).

requirements that fail to focus on the capability of the alternate retail public utility. OPIC disagrees.

While 30 TAC section 291.113(b)(4) does not contain a distance requirement, the location of a water system (an existing retail public utility) certainly may be considered in the Commission's determination on the capability of the alternate retail public utility to provide service. Obviously, if the alternate provider is too far away, near-term service would be impracticable, and the amount of infrastructure needed to provide service at all would seriously impair the alternate provider's ability to serve the development at the level and manner of service requested. If the DDU facilities located nearly 100 miles away constituted the facilities designated to provide service to DDI's property in Grayson County, the capability of the alternate provider to service DDI would be more than suspect.

However, evidence exists that a closer DDI facility could exist. The ED, in the Order, cites to a separate application for a proposed water plant that appears to be located within DDI's development to serve 200 connections that was submitted by DDI rather than DDU. While an approved water system for DDI may provide some evidence of the capability of *DDI* to provide continuous and adequate service to 200 connections, DDI is not the alternate retail public utility from which the Petitioner has stated that it will be seeking service. Furthermore, the provision of service to 200 connections does not meet the level of service requested by DDI in both its request for service to the WCID and the revised timeline.

While DDI cites to financial commitments, DDU's experience, and initiation of a water availability study as a basis for demonstrating capability, the required consideration of the timeframe, manner and level of service of the alternate retail public utility necessitate more than mere financial commitment and experience. A petitioner must show *how* the alternate provider

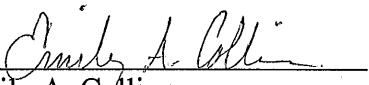
proposes to meet the requested or needed time constraints of the development as well as the level and manner of service. Whether this showing is made by submitting plans and specifications for the provision of water or by submitting a letter providing information on what infrastructure and improvements can be done by a specific date, the Petitioner must show how DDU will provide continuous and adequate service within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area. DDI has not made any such showing. Therefore, OPIC recommends that the Commission deny the MTO based on DDI's failure to demonstrate that the alternate retail public utility from which it seeks service is capable of providing continuous and adequate service within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission deny the Motion to Overturn.

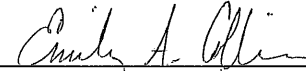
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Emily A. Collins
Assistant Public Interest Counsel
State Bar No. 24045686
P.O. Box 13087 MC 103
Austin, Texas 78711
(512) 239-6363 PHONE
(512) 239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Brief on Motion to Overturn were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Emily A. Collins

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MAILING LIST
DOUBLE DIAMOND, INC.
TCEQ DOCKET NO. 2007-1374-UCR

Arturo D. Rodriguez, Jr.
Russell & Rodriguez, L.L.P.
102 West Morrow, Suite 103
Georgetown, Texas 78626
Tel: 512/930-1317 Fax 512/930-7742

Randy Gracy, Vice President
Double Diamond Companies
10100 N. Central Expressway, Suite 400
Dallas, Texas 75231

Leonard Dougal
Ali Abazari
Jackson Walker, L.L.P.
100 Congress Ave., Suite 1000
Austin, Texas 78701
Fax: 512/236-2002

The Honorable Craig Estes
The Senate of the State of Texas
P.O. Box 12068
Austin, Texas 78711
Tel: 512/463-0130 Fax: 512/463-8874

Stephanie Bergeron-Purdue
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Brian Dickey
Texas Commission on Environmental Quality
Water Supply Division, MC-153
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4691 Fax: 512/239-2214

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-4007

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311